No. 02-1717 (3)

Supreme Court, U.S.
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In The
Supreme Court of the United States

JUAN HERNANDEZ,

Petitioner,

v.

CRAWFORD BUILDING MATERIAL CO., etc.,

Respondent.

ROSA MALVEAU, *et al.*,

Petitioners,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF LAW REGARDING WHICH THE COURTS OF APPEALS ARE IN CONFLICT

The petition notes that eleven appellate decisions in four circuits have acknowledged the existence of an inter-circuit conflict regarding the ultimate employment decision doctrine. (Petition, pp. 12-15). Those decisions were written or joined by twenty-three different judges. The *Malveau* respondents[1] do not seriously deny that a well established conflict exists regarding this issue.

The petition notes that the Fifth Circuit has applied its ultimate employment decision doctrine in 12 cases (Petition, pp. 8-10), while the First, Second, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have rejected that doctrine in a total of 41 decisions. (Petition, pp. 10-13). Respondents argue that this Court has denied certiorari in three of this total of 53 decisions. (Brief in Opposition, p. 8 and n. 5). That circumstance obviously does not establish the absence of a conflict. In two of these cases, moreover, the questions presented in the petitions did not raise the issue presented by this case.[2] A related question was raised by the petition

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[1] The respondent in *Hernandez* waived its right to respond to the petition.

[2] In *Gupta v. Florida Bd. of Regents*, 531 U.S. 1076 (2001), the questions presented were as follows:

> I. Should this Court grant certiorari, vacate and remand, in light of *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. ___, 120 S.Ct. 2097 (2000), a case in which the court of appeals based its reversal of the trial court on evidence rejected by the jury?

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in *Mattern v. Eastman Kodak Co.*, 522 U.S. 932 (1997), but at that point in time the now obvious conflict had not yet clearly emerged. *All* of the eleven appellate decisions

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> II. Does a district court's determination concerning judgment as a matter of law command the same deference as factual findings at bench trials, rulings on motions for new trial, and decisions on preliminary injunctions?
>
> III. Is the existence of a hostile environment a question of fact for the jury or a question of law for an appeals court?

(Petition for Writ of Certiorari, No. 00-726, p. i).

In *Torres v. Pisano*, 522 U.S. 997 (1997), the questions presented were as follows:

> 1. Does a terrified victim of supervisory hostile environment racial and sexual harassment waive her legal protections under Title VII and Title IX against unwelcome and unsolicited pregnancy, racial and sexual harassment because she asked an official of the university to keep the matter confidential, rather than taking immediate action to stop the harassment?
>
> 2. May an employer which has actual notice and constructive notice of the existence of a hostile working environment avoid liability under Title VII and Title IX on the grounds that an official of the institution honored the terrified victim's request to keep the matter confidential, rather than taking immediate action to stop the harassment?
>
> 3. Whether the following facts provide a defense to employer liability under Title VII and Title IX: (1) the victim did not suffer "any serious physical or psychological harm that would have occurred if the employer did not act forthwith"; (2) the victim's letters to the employer's agent recounted only a few relatively minor incidents of harassment; (3) the victim was the only female employee in the supervisor's office at the Dental Center; and (4) there is no indication in the record that any other employees were being harassed by the supervisor in violation of Title VII?

(Petition for Writ of Certiorari, No. 97-578, p. i).

recognizing that conflict were issued after the denial of certiorari in *Mattern*.

Of the 41 appellate decisions rejecting the Fifth Circuit's ultimate employment decision doctrine, respondents attempt to distinguish only seven. Respondents' analysis of even these seven decisions is unpersuasive. Respondents object, for example, that in several of these cases the interpretation of Title VII (or other federal anti-retaliation law) arose in a motion for summary judgment,[3] a motion for judgment as a matter of law,[4] or a Rule 12(b)(6) motion to dismiss for failure to state a claim.[5] But since the question presented in all of those cases, as here, is purely an issue of law, the procedure used to raise the issue is simply irrelevant. Respondents' descriptions of the legal issue decided in several other cited cases is not correct.[6]

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[3] Brief in Opposition, p. 9 (*citing Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 447 (2d Cir. 1999)).

[4] Brief in Opposition, p. 9 (*citing Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998)).

[5] Brief in Opposition, p. 9 (*citing Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994), and *Passert v. American Chemical Society*, 935 F.2d 322 (D.C.Cir. 1991)).

[6] Respondents assert that "in neither *Heuer v. Weill-McLain*, 203 F.3d 1021 (7th Cir. 2000) nor *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996), was the Seventh Circuit dealing directly with the retaliation issue." (Brief in Opposition, p. 10). To the contrary, that was precisely one of the issues in both cases.

Respondents next argue, quite inconsistently, that although those cases do indeed decide the scope of federal anti-retaliation provisions, that portion of the opinions was dicta. (Brief in Opposition, p. 10). *Heuer* as well as *Knox* rests on two distinct grounds. *Knox* holds both that the instruction in question correctly construed section 704 of Title

(Continued on following page)

II. THE CORRECTNESS VEL NON OF THE FIFTH CIRCUIT'S ULTIMATE EMPLOYMENT DECISION DOCTRINE IS DISPOSITIVE OF THIS CASE

Respondents assert that "[n]o matter which definition is used, the actions complained of by Petitioners do *not* qualify as adverse employment actions." (Brief in Opposition, p. 7) (Emphasis in original). To the contrary, that could not literally be true in this, or indeed any other case. In all cases, the question of whether an employer's practices "qualify as adverse employment actions" necessarily turns at least in part on how "adverse employment actions" are defined. In this case that legal definition is the *only* issue, since as respondents acknowledge the relevant facts are undisputed. (Brief in Opposition, p. 3).

The Fifth Circuit's ultimate employment decision doctrine defines "adverse employment actions" in a manner which excludes the retaliatory practices in this and many other cases. The court of appeals concluded that there was no ultimate employment decision in *Banks* (now *Malveau*), and thus no adverse employment action, because the petitioners were permitted to remain in their part-time Janitor I jobs, with no change in their "job

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VII, and that the defendant had adequately objected to that instruction. 93 F.3d at 1333. *Heuer* holds both that the retaliation complained of was serious enough to violate Title VII, and that the plaintiff had failed to assert that the employer (rather than a co-worker) was responsible for the retaliation. 203 F.3d at 1023. Where a decision rests on two independent grounds, neither portion of the opinion can be dismissed as dicta. In any event, the same interpretation of Title VII can be found in two other Seventh Circuit decisions. *Smart v. Ball State Univ.*, 89 F.3d 437, 440 (7th Cir. 1996); *Collins v. State of Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987). Respondents do not contend that the holdings in these cases are dicta.

duties, compensation, or level of benefits." (Pet. App. 42a). Their level of compensation held steady at about 38% of the wages of the full-time male janitors;[7] because petitioners had no benefits to start with, their "level of benefits" was not reduced.

Respondents insist that locking the petitioners into these part-time no-benefit jobs was not an "adverse employment action" because it maintained "the status quo" regarding the level of compensation and benefits for Janitor I jobs. (Brief in Opposition, p. 8). The exclusion of petitioners from the full-time Janitor jobs, respondents argue, was not "adverse to Petitioners" since they had not been promised, and had no legal entitlement to, those particular jobs. (Brief in Opposition, p. 7). The Fifth Circuit indeed held, and respondents insist, that the practices which locked Malveau and the other petitioners into the part-time Janitor I jobs were therefore not "adverse employment actions."

That holding and contention are assuredly about the legal definition of an adverse employment action. The actual financial consequences of the disputed practices themselves are not in dispute; petitioner Malveau, for example, who earned approximately $8,500 a year as a Janitor I, would have made more than $22,000 a year as a Janitor. The promotion rules which prevented Malveau from becoming a full-time Janitor obviously caused serious financial injury. The Fifth Circuit held that that injury

[7] Almost all of the male janitors worked full-time year round. The petitioners worked *half time* for nine months of the year, or 37.5% of the hours of the full-time men.

was not actionable because the particular retaliatory employment scheme involved did not constitute an "ultimate employment decision." That same financial injury would have been actionable in the Fifth Circuit if Malveau had been *de*moted from Janitor to Janitor I, rather than being prevented from *pro*moting from Janitor I to Janitor.

No other circuit limits the protections of federal anti-retaliation statutes to changes in the "duties, compensation or level of benefits" of a worker's *current* position. The Ninth Circuit construes Title VII to forbid any retaliatory practice "likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The employment practices in this case, which prevented workers from promoting from part-time to full-time work, would obviously have just such a deterrent effect. *See id.* at 1241 (retaliatory denial of promotions or job references both actionable). The Eleventh Circuit interprets Title VII to bar any retaliatory measure which "deprives [the employee] of employment *opportunities*," *Bass v. Board of County Commissioners, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001) (emphasis added), or which has other negative "repercussions." *Graham v. State Farm Mutual Insurance Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999). The measures in this case, which prevented the petitioners from moving into jobs that would have more than doubled their income, clearly met that standard. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (retaliatory denial of pay raise actionable under section 704 of Title VII); *Spearman*

v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (same).

The Second, Fourth and Eighth Circuits have held, as the respondents note,[8] that the retaliatory action must adversely affect the "terms and conditions of employment" of the plaintiff. But none of these circuits limit "adverse employment action" to changes in the duties, compensation and benefits of the particular *job* a plaintiff holds; to the contrary, all of these circuits construe federal anti-retaliation laws to forbid adverse actions unrelated to a plaintiff's current position. *E.g., Von Gunten v. State of Maryland*, 243 F.3d 858, 864-65 (4th Cir. 2001) (anti-retaliation provision of Title VII covers retaliatory denial of a promotion); *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) (retaliatory adverse references actionable; "post-employment blacklisting is sometimes more damaging than on-the-job discrimination."); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (retaliatory refusal to write a recommendation letter for former employee may cause actionable injury to "tangible *future* employment objectives" even though it would not adversely affect the former employee's "current employment situation.") (Emphasis in original).

If this action had arisen in any of these other circuits, the (largely undisputed) allegations would have been sufficient to state a claim of unlawful retaliation. Only application by the Fifth Circuit of its widely disapproved

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[8] Brief in Opposition, pp. 6-7 (*citing Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997), *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), and *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)).

ultimate employment decision doctrine led to a contrary result in this case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgments and opinions of the court of appeals.

Respectfully submitted,

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